MESSAGE OF GOVERNOR PORTER,

VETOING THE BILL PROVIDING FOR THE ELECTION OF THE BOARD OF CANAL COMMISSIONERS BY THE LEGISLATURE.

Read in the House of Representatives, April 1st, 1843.

To the Senate and House of Representatives of the Commonwealth of Pennsylvania:

GENTLEMEN: I herewith return to the House of Representatives, in which it originated, the bill entitled "*An Act to reduce the expenses, and provide for the election of the Board of Canal Commissioners,*" without the executive sanction; and, in conformity to the requirement of the constitution, I proceed to assign, with brevity, the reasons which have induced me to adopt this course.

The object of this bill is to remove the present Board of Canal Commissioners, and to fill their places by a temporary board, to be elected by the Legislature, to serve until their places are supplied under the provisions of the first section of the act, at the next general election. If there were no constitutional barriers to any action on the subject whatever by the present Legislature, and this bill only provided for the election of a Board of Canal Commissioners by the people, it would afford me great pleasure to give it my approval; but as it seeks to vest in the Legislature the appointment of a Board for a period less than a year, I can see no reasons of policy for it, and abundant reasons grounded on principle to constrain me to withhold my assent, independent of my constitutional objections, which I shall give in conclusion. The members of the present Board have discharged their duty with industry, fidelity and ability, and I have not yet discovered the least reason to believe that their places would be better supplied by the Legislature. If the members of the present Board have been faithless, incompetent, or corrupt, impeach them,—try them in the mode pointed out by the constitution; but it is unjust and unreasonable to punish them in any other way. No charge of mal-conduct or incompetency has been established against them, and as far as I am informed, and believe, they have proven themselves to have been governed by a proper sense of public duty. They have dispensed with unnecessary officers,—they have laid the ground-work of a system of economy in the public disbursements, which, if carried out, must render our improvements an impetus rather than a drawback to the industry of the people; and they have brought into the Treasury a larger amount of profit than has ever yet been derived from those improvements.

Under these circumstances the removal of the Board, in the very summary manner indicated by the second section of the bill, would appear to the world as a rebuke for the faithful performance of a high public duty. It would, in effect, be proclaiming to our common constituents, that we are opposed to reform, economy, and retrenchment; and that officers who had devoted their time and attention to the best means of replenishing an exhausted Treasury, from a source hitherto considered unproductive, were no longer deemed worthy of confidence or support. Until I am convinced that such is the opinion of the people of Pennsylvania, I cannot consent to ratify an act that could, in these times of general distress and embarrassment, be construed into a rebuke of that character. In every section of the State our constituents are looking to us to devise some means of maintaining the public faith, and, at the same time, relieving them

from the burthens of taxation. It would seem to me, to be treating their expectations with mockery, to place a stigma upon officers whose efforts had been successfully directed to an alleviation of the embarrassments of the public Treasury, by unnecessarily removing them at the very moment when their experience and services were of great advantage to the general interests of the Commonwealth. When the people petition their representatives for the removal of faithful agents, in the manner pointed out by the second section of the bill—when they shall proclaim that they do not desire to see the public works rendered a source of profitable revenue, and so alter the fundamental law as to embrace the proposed change—I shall then acquiesce in their decision. But, convinced as I am, that the public improvements have been judiciously managed by the present Board—that they have introduced a laudable system of economy and retrenchment—that they have corrected many abuses that imperceptibly crept into the management of the works—and that, as is shown by the result of the last year's business, they have placed a large amount of profit in the Treasury—I cannot consent that they should be displaced without an assignable cause, and thereby declare that the faithful and diligent discharge of an important trust was no longer to be expected or approved.

The present Board of Canal Commissioners has, by lopping off unnecessary officers, increasing the duties of those retained, facilitating business, and diminishing the general expenses of our improvement system, reduced its annual charge more than $235,000. This undeniable fact, of itself, furnishes the strongest reason against the policy of passing this bill.

The subject of electing Canal Commissioners by the Legislature is not new in Pennsylvania. It was tried before the adoption of the present constitution, and when it was tried, was repudiated and abandoned in less than a year, although the instance to which I refer was far less objectionable than this. That was the appointment of a Board of Canal Commissioners by an act of Assembly, to which the assent of the Governor was given, as in the case of other laws; but this bill takes the appointment entirely out of the sanction of the Executive, and confines it exclusively to the Legislature. It was again attempted since I had the honor of being entrusted with the Executive functions, and on the 10th day of February, 1841, I returned the bill, as I do this, with my objections, and it was defeated. To that message, of the above date, in the Journal of the House of Representatives, I beg leave to refer you, as embodying what was then, and still is, my opinion as regards the policy of this measure. I shall not refer to it in detail, but the concluding paragraph is of too much importance to be omitted. It was in these words: "The appointing power is the most embarrassing part of the Executive duties. I have no desire to increase its amount, nor even to retain that which is now vested in the Governor, where it can be safely exercised elsewhere. If a change is deemed essential to the prosperity of the public works, and that the power of appointment of Canal Commissioners is not safe in the hands of the Executive, I have no desire to retain it. Let it go directly to the whole people, at their annual elections. The Legislature will, at all times, find me ready to co-operate with them, in enabling the people to elect all officers, whose appointment is not specially provided for in the constitution; but I never can sanction a law which takes away, not only the rights of the Executive, but of the people, and gives power to the Legislature not contemplated by the constitution, and which, in my judgment, would be a usurpation of power by the Legislature pregnant with evil. However indisposed I may be to retain all the powers of the Executive, it is my sworn duty to protect the rights of the people from legislative encroachments, and I intend to do it.

"The issue is now before the people of this Commonwealth for decision; and with that decision, whatever it may be, I shall be perfectly satisfied. Should a majority determine that I have done wrong, in refusing to sanction this change in the mode of appointing Canal Commissioners—that this contemplated alteration is wise, prudent, and safe—and that better selections would have been made by the two Houses of the Legislature than by the people, or the Executive, they can easily proclaim this opinion, and execute their purpose by some other Executive agent; but if they think otherwise—if they agree with me—if they can see in the proposed system only political scrambling for office, discord, and dissension; they will also pronounce that judgment for the guidance of our future course, and will thus settle, on a certain basis, the organization of the Board of Canal Commissioners, in reference to which, we now unfortunately entertain such conflicting opinions."

In this extract two points will be particularly noticed. The first is, the expression of my entire willingness to assent to the election of Canal Commissioners *by the people;* and the other is, that just on the eve of my second election, I submitted the issue openly and distinctly to the people, whether I was right in resisting, or the Legislature in grasping at the election of Canal Commissioners, in exclusion of both the Executive and the people. The result of that election known. I was sustained by a majority of 23,000 votes, and the Legislature elected when that sue was tendered, did not move in this matter at all. I had, therefore, hoped, as the people d, that whatever else was unsettled, this question, at least, was at rest. But the passage of s bill proves otherwise.

By the published journal of your proceedings it is found, that this bill originated without a tary petition from the people; and long and loud as it has been agitated on the floor of the islature, and with all the aid of the individuals interested in effecting the object, not a pet , or resolution, or other expression of public opinion at any public meeting has found here, asking that the Canal Commissioners be elected by the Legislature.

Much of the clamor and disturbance which have attended the various changes effected and sought in the mode of appointing and electing Canal Commissioners, may no doubt be traced to the dispensation of patronage and favors by those officers. It so happens, that they have not at all times vacant places for the friends of members of the Legislature at disposal, or that those friends are not always the best qualified to fill them; and in these cases it generally seems, as if the individuals disobliged consider it a paramount duty, enjoined by the highest commands of patriotism, to wreak vengeance on the devoted heads of the offending officers. And it not unfrequently occurs, that they avail themselves of their legislative station to carry, or attempt to carry, that object into effect.

The employment of improper subordinate officers and agents on our public improvements, has been a frequent and just theme of complaint; and I believe in nine cases out of ten, in which these officers and agents have been continued in the public service, they have been backed and sustained by the influenee of official friends. To this same influence also may be fairly ascribed at least twenty millions of dollars of the present State debt; and to such a frightful extent had this growing evil already been carried in the early stage of our improvement system, that by the Act of 24th of March, 1828, the Legislature itself was obliged to prohibit "any member of either branch, either directly or indirectly, from having any contract for the construction of any of the public works." All that was then left for this kind of influence to reach, was the appointment of officers on the railroads and canals; and if this had been prohibited as effectually, it is very probable I should have been spared the performance of the duty which this bill imposes on me.

Why, then, is the passage of this bill to be urged? What good policy can it promote? What public interest will it advance? What prejudice will result to the public, if the present Board be left in office? I must have these questions answered more satisfactorily than they have been, before I sanction such a law.

An experiment in a new mode of transportation is about to be tested, which, while it is not intended to give it an undue advantage over the persons engaged in the old system of carrying goods and merchandize, promises fair to open our canals and railroads to individual competition and enterprise, and to lessen the evils heretofore experienced from the monopoly in the carrying trade, enjoyed by companies of large capital. Prudence and sound policy would seem to dictate, that this new system should be carried out and tested by the officers, under whose management it has thus far progressed, and whose devotion to the public interests is so manifestly exhibited in the flattering results of the last year's operations. Three changes in the Board in one year, as would be the case should this bill become a law, would create a confusion, which a wise regard for the public welfare, at this peculiar and trying crisis in our financial affairs, should lead us to avoid. No individual would pursue such a course in his private business, and I can perceive no public interest to be promoted by its adoption in the present case. The navigation is expected to commence in a few days. The officers are at their posts, ready to commence business. New principles have been engrafted on the rates of tolls, and new instructions given. These have been received by, and explained to, the public agents. Like all sudden and unexpected changes, the removal of the present Board, at this time, would produce a derangement in the transaction of the business connected with the improvements, which would be seriously felt throughout the year.

This bill provides that the President of the Board of Canal Commissioners shall be elected by the two Houses jointly, and each of the two others by the Senate and House separately. A most serious difficulty here presents itself under the constitution. The twenty-fourth section of the first article provides, that "Every order, resolution, or vote, to which the concurrence of both Houses may be necessary, (except on a question of adjournment,) shall be presented to the Governor, and before it shall take effect, be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses, according to the rules and limitations prescribed in case of a bill."

Now the President of the Board is to be elected by both Houses, assembled in the mode prescribed. He is to be elected by *their vote*, and no provision is made for submitting that vote to the sanction of the Executive. This is in the very teeth of the provision of the constitution quoted, and such a provision would, of course, be null and void, if I even signed it. Let it not be said, that the two Houses elect a State Treasurer without this Executive sanction. That is specially directed in the constitution. Neither can it be said that they elect a United States Senator in the same mode. The constitution of the United States provides for *that* election.

The very object of inserting this provision into the constitution doubtless was to prevent precisely such acts as this from being passed. It was to impose some check on legislative usurpation, the most frequent, oppressive, and tyrannical of all others.

I will here take occasion to state, what I conceive to be the true landmarks of legislative and executive power, established in the constitution. The first section of the first article provides, that "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives. The eleventh section of the same article provides, that "Each House shall choose its Speaker and other officers; and the Senate shall also choose a Speaker pro tempore, when the Speaker shall exercise the office of Governor." The thirteenth section of the same article provides, that in addition to certain other authorities, each House "shall have all other powers necessary for a branch of the Legislature

of a free State." By the fourth article, the sole power of impeaching is vested in the House of Representatives, and the power of trying all impeachments, in the Senate. "The Governor and all other civil officers under this Commonwealth shall be liable to impeachment for any misdemeanor in office." By the sixth section of the third article: "A State Treasurer shall be elected annually by joint vote of both branches of the Legislature." By the eighth section of the same article it is provided, that "All officers whose election or appointment is not provided for in this constitution, shall be elected or appointed as shall be directed by law. No person shall be appointed to any office within any county, who shall not have been a citizen and an inhabitant therein one year next before his appointment, if the county shall have been so long erected, but if it shall not have been so long erected, then within the limits of the county, or counties, out of which it shall have been taken. No member of Congress from this State, or any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State, to which a salary is, or fees or perquisites are, by law, annexed; and the Legislature may by law declare what State offices are incompatible. No member of the Senate, or of the House of Representatives, shall be appointed by the Governor to any office during the term for which he shall have been elected."

This section, it will be observed, prohibits the Governor from appointing members of the Senate and House of Representatives to office, but does not extend that prohibition to the Legislature itself, evidently contemplating that the Legislature had not, and could not, have the power to appoint to office further than that power is distinctly conferred in the constitution itself. The clause that "all officers whose election or appointment is not provided for in the constitution, shall be elected or appointed as shall be directed by law," simply means, that it shall be directed by law, what authority recognized by the constitution, as possessed of the power, shall elect or appoint. It confers no power on the Legislature, by the terms used, to elect or appoint, unless some other part of the constitution bestows that power. And this will be obvious, on reference to other provisions of the constitution, bearing on the same point. By the eighth section of the second article, it is provided: "He shall appoint a Secretary of the Commonwealth during pleasure; and he shall nominate, and by and with the advice and consent of the Senate, appoint all judicial officers of courts of record, unless otherwise provided for in this constitution." The agency of the Senate in appointments to office is thus specifically described and regulated, so as to exclude the inference that it extends beyond the boundaries laid down.

From these provisions of the constitution it is evident, that the Legislature possesses *only the "legislative power of this Commonwealth,"* and can elect only the officers of the two Houses and a State Treasurer. If the people desire to invest the Legislature with other or greater power of electing and appointing to office, it can easily be done by an amendment of the constitution. Until they do, all departments of the government must be content with such powers as they possess under a legitimate construction.

The appointment to office under the constitution of Pennsylvania is not a legislative, but an executive power, and can be exercised only by the Executive, or by the people in elections.

The first section of article second is in these words: "The Supreme Executive power of this Commonwealth shall be vested in a Governor." It is provided in section thirteen of the same article, that "He shall take care that the laws be faithfully executed." It is provided in the tenth section of the same article, that "He may require information in writing from the officers in the Executive Department, upon any subject relating to the duties of their respective offices."

The eleventh section of the schedule of the amended Constitution is in these words: "*The appointing power shall remain as heretofore*, and all officers in the appointment of the Executive department, shall continue in the exercise of the duties of their respective offices, until the Legislature shall pass such laws as may be required by the eighth section of the sixth article of the amended Constitution, and until appointments shall be made under such laws, unless their commissions shall be superseded by new appointments, or shall sooner expire by their own limitations; or the said offices shall become vacant by death or resignation; AND SUCH LAWS SHALL BE ENACTED BY THE FIRST LEGISLATURE UNDER THE AMENDED CONSTITUTION." These sections define the extent of the power of the Executive in making appointments to office, and most clearly show, that unless taken away by the Constitution itself, or by laws passed in accordance with its provisions, the power of making such appointments is vested in that functionary. The second section of the ninth article declares "all power to be inherent in the people," and in all cases where the Constitution does not vest the power of election or appointment in some particular department of the goverment, it may be directly exercised by them, if directed by law.

The eleventh section of the schedule of the amended Constitution clearly recognizes the Executive authority on this subject, and unless such laws as are required by the eighth section of the sixth article, were enacted by the *first* Legislature under the amended Constitution, and those laws vested election or appointment of officers in the people, it remains in full force. No such laws were required or passed, and consequently they cannot be, by *this* Legislature. Happily for us, this question has been determined by the Supreme Court, and both the Legislature and Executive are bound by it. In the case of the Commonwealth vs. Leib, 9 Watts, p. 226, that tribunal, in speaking on the subject of the power of subsequent Legislatures, when

ever a special power is enjoined on the first Legislature, under the amended Constitution, says: "And if even there were a discretion in the matter, it is given to the General Assembly at its *first* session, AND TO NONE OTHER. It is a delegation to that specific body, of a portion of the sovereign power of the people entrusted by them to the Convention, establishing a fundamental law permanent and indefeasible as the Constitution itself, partaking of its eminent character, and intended to govern the conduct of the people and of the constituted authorities." This section of the schedule is drawn with great clearness. Its meaning cannot be misunderstood. The general power of the Legislature to pass such laws as might be required under the eighth section of the sixth article, is expressly limited and confined to the "*first Legislature under the amended Constitution.*"

The great object of the amended Constitution was, to diminish the power of the Executive and enlarge that of the people. No additional power is vested in the Legislature; on the contrary, its power is materially abridged. In every instance in which it is noticed, it is restricted, but in the single instance of conferring on the Senate the power of consenting to the appointment of judicial officers.

It would be a most extraordinary spectacle to see the Legislature, after all the efforts of the people in the amended Constitution, to control and restrain the action of their servants, assuming additional powers—claiming to elect, or appoint, officers never before elected or appointed, by them; or if at all, but in a single repudiated and abandoned instance; and this too without being called on by the people to do it. All the wholesome restraints on the Governor against appointing members of the Legislature to office, lest it might tend to corruption, are thus broken down, and the very evil guarded against in the Governor is licensed, and made the means of bounty to the members of the Legislature themselves, whose virtue, it was feared, might be too often and too easily tempted. This surely cannot be the true meaning and design of the Constitution. If it is, its restrictions are mere machines, and the power of the Legislature as omnipotent, as Lord Coke describes that of the British Parliament to be.

The great misapprehension seems to me to be this; it appears to be taken for granted that the two Houses of the Legislature are, in fact, the people of Pennsylvania, when it too often happens they are quite different things. Unfair apportionment bills—accident—apostacy—or deception—may fill the legislative seats with members who do not represent the wants and opinions of the people. Instances are not wanting, in which the action of the Legislature met with no sanction save that of the majority of its members, while the indignant reproofs of the entire community told them how much they had mistaken, or misrepresented, the public feeling. I need not apply this remark to the present Legislature; there are others to which it is obviously applicable. To them I confine it.

I think a very important constitutional principle is involved in this measure, and let the result be as it may, I shall not shrink from my post. I think the election or appointment of the Canal Commissioners belongs only to the *Executive* or the *people*, and cannot be vested in the *Legislature* without a gross usurpation of power; and, so thinking, I have performed my duty by resisting, as far as I can, the adoption of this bill. Whether it is to receive the *constitutional form* of a law, depends on you—how far it will be binding, if it should, is for another tribunal to decide; and I am glad, in a question of such magnitude, that we have a constitutional umpire to arrest both your encroachments and mine, if we make any, on the liberties of the people.

DAVID R. PORTER,

EXECUTIVE CHAMBER,
April 1, 1843.